STATE OF MICHIGAN

COURT OF APPEALS

CITY OF KENTWOOD,

Plaintiff-Appellee,

v

POLICE OFFICERS LABOR COUNCIL,

Defendant-Appellant.

UNPUBLISHED
October 28, 2008

No. 279993
Kent Circuit Court
LC No. 07-005364-CL

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order denying its motion for summary disposition and granting plaintiff's motion for summary disposition pursuant to MCR 2.116(I)(2). We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The facts of this case are not in dispute. In 2006, James Connell (Grievant) was hired by plaintiff as a detective in the Kentwood Police Department (KPD). Shortly after starting as a detective, Grievant learned that he would not be assigned a take-home vehicle, at which time he filed a grievance alleging that the failure to assign him a take-home vehicle violated the parties' collective bargaining agreement (CBA). The matter was processed through the grievance procedures and a demand for arbitration was made. The parties selected an arbitrator and a hearing was held on February 15, 2007. Both parties had an opportunity to present testimonial and documentary evidence, and examine and cross-examine witnesses. Both parties also filed post-hearing briefs.

The arbitrator granted the grievance and concluded that Grievant was to be assigned a take-home vehicle for the duration of his detective assignment. The arbitrator determined there was an established past practice of assigning take-home vehicles to detectives and, therefore, the burden was on the KPD to prove that it successfully repudiated this practice by implementing operating procedure FC: 301 without objection by defendant. The arbitrator stated that the "past practice became a distinct and binding working condition that could not be altered without the mutual consent of the parties where the collective bargaining agreement is silent on the assignment of take-home vehicles." The arbitrator held that FC:301 was only valid "to the extent that it was consistent with the collective bargaining agreement, including established practices." *Id.* The arbitrator concluded that the police chief's decision not to assign a take-home vehicle was inconsistent with the past practice of assigning take-home vehicles to all detectives.

Plaintiff thereafter filed a complaint in the circuit court to vacate the arbitration award. Defendant and plaintiff both filed competing motions for summary disposition. Following a hearing, the trial court granted summary disposition in favor of plaintiff, vacated the arbitration award, and ordered the parties to re-arbitrate the matter before a new arbitrator. The trial court concluded that the arbitrator failed to adhere to the contractual limitations of her authority because, contrary to Section 5.5 of the CBA, she "ignored and failed to apply the plain terms of Sections 17.2 and 17.12 of the CBA."[1]

The basis for this appeal is defendant's allegation that the trial court improperly vacated the arbitration award. The trial court denied defendant's motion for summary disposition and granted plaintiff's motion pursuant to MCR 2.116(I)(2). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998). This Court also reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004); *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Judicial review of an arbitrator's decision is narrowly circumscribed. *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). A court may not review an arbitrator's factual findings or decision on the merits. *Id*, citing *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). The inquiry for the reviewing court is whether the award was beyond the contractual authority of the arbitrator. *Id.* If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, "judicial review effectively ceases." *Id.* As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, a court may not overturn the decision even if convinced the arbitrator committed a serious error. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989), citing *United Paperworkers Int'l Union, AFL-CIO v Misco, Inc*, 484 US 29, 108 S Ct 364, 98 L Ed 2d 286 (1987). Arbitrators only exceed their authority when they act "in contravention of controlling legal principles" *Saveski, supra* at 554, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Ultimately, "a reviewing court has three options when a party challenges an arbitration award: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001).

The trial court and plaintiff assert that the arbitrator ignored and failed to apply the plain terms of sections 17.2 and 17.12. At issue is the claimed past practice of plaintiff to assign a take-home vehicle to bargaining members who assume the rank of detective.

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[1] Essentially, section 17.2 provides that the KPD has the right to establish reasonable departmental rules, regulations, policies and procedures that are not inconsistent with other provisions of the CBA. Section 17.12 is a waiver clause that provides that the CBA supersedes all prior agreements and that the parties agree to bargain collectively with respect to matters not specifically referred to or covered in the CBA.

A past practice that does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. *Mid-Michigan Ed Ass'n v St Charles Comm Schools*, 150 Mich App 763, 768; 389 NW2d 482 (1986), overruled on other grounds *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309; 550 NW2d 228 (1996); see also *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Auth*, 437 Mich 441, 454, 455; 473 NW2d 249 (1991). If a past practice becomes part of the employer's structure and condition of employment, the past practice assumes the same significance as other portions of the collective bargaining agreement. *Mid-Michigan, supra* at 768. Accordingly, where an employer institutes a practice and permits it to continue, it cannot later unilaterally change the practice. *Id.*

The creation of a term or condition of employment by past practice is premised in part upon mutuality. In other words, both parties must mutually accept the practice. *Amalgamated, supra* at 454-455. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." *Id.*

In this instance, there was ample testimony regarding the past practice of all detectives being supplied take-home vehicles. Plaintiff does not dispute that every other bargaining unit detective had been assigned a take-home vehicle; nor could plaintiff identify any bargaining unit detective who was not assigned a take-home vehicle. A review of the evidence shows that since at least 1990, every bargaining unit member assigned to be a detective had been provided with a take-home vehicle. Accordingly, the arbitrator's decision that the past practice of providing vehicles to detectives had become a term or condition of employment was reasonable.

Nevertheless, plaintiff asserts that the arbitrator exceeded her authority in concluding that this matter was governed by the past practice because the past practice was modified by the CBA. When a bargaining agreement unambiguously covers a term of employment that conflicts with a parties' past practice, "[t]he unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract." *Port Huron, supra* at 312. Comparatively, when the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. *Amalgamated, supra* at 454-455.

Here, the CBA does not specifically address the assignment of take-home vehicles. Instead, section 17.2 of the CBA gives the employer the right to establish reasonable departmental rules, regulations, policies and procedures not inconsistent with the provisions of the CBA. Rule FC:301, in turn, gives the police chief discretion over take-home vehicle assignment. However, language in the contract giving the employer discretion over a term or condition of employment does not necessarily preclude a past practice from constituting a term of employment. *Amalgamated, supra* at 457. When a practice is consistent with discretion conferred upon an employer by contract but is not required by contract, such as the practice at issue, a factual question is presented regarding the existence of the mutuality necessary for a

binding past practice. *Id* at 456-457.[2] As noted, it was reasonable for the arbitrator to conclude that the assignment of take-home vehicles to detectives had become a binding past practice.

The trial court also agreed with plaintiff that pursuant to section 17.2 of the CBA, defendant's grievance was not timely filed since it was filed within five days of the decision not to assign Grievant a take-home vehicle and not five days from the enactment of FC: 301. However, by the terms of the CBA, FC:301 was valid when it was enacted to the extent that it did not conflict with the provisions of the CBA, including past practices which, as previously noted, assume the same significance as other portions of the CBA. *Mid-Michigan, supra* at 789. Defendant was not required to file a grievance in this matter until plaintiff actually acted in contravention of the past practice. The policy affording the police chief discretion regarding take-home vehicles did not become inconsistent with the CBA until it was implemented to violate the past practice. Defendant's grievance was filed within five days of the violation. As such, the grievance was timely filed.

Finally, plaintiffs contend that regardless of the foregoing analysis, unilateral action by plaintiff in this instance was appropriate since defendant waived its right to bargain over this issue in Section 17.12, referred to as the "zipper clause." That clause provides:

> Section 17.12 Waiver Clause. It is the intent of the parties hereto that the provisions of this Agreement, which supersedes all prior agreements and understandings . . . shall govern the relationship and shall be the sole source of any and all claims which may be asserted in arbitration hereunder, or otherwise. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter. . . . Therefore, the Employer and the Union for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The waiver of statutorily protected rights in a contractual provision, such as the right to bargain over working conditions, should not be inferred unless the undertaking is "explicitly stated." *Metropolitan Edison Co v NLRB,* 460 US 693, 708; 103 S Ct 1467; 75 L Ed 2d 387 (1983). In

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[2] Similarly, in *Trenton v Trenton Fire Fighters*, 166 Mich App 285, 289-290, 295, 420 NW2d 188 (1988), this Court upheld the Michigan Employment Relations Commission's conclusion that the fire department's "long-standing policy" regarding minimum manpower requirements established a term or condition of employment, notwithstanding the arbitrator's conclusion in prior proceedings that the contract management-rights clause reserving the employer's right to control "operations" permitted a change in manpower requirements.

applying this standard, the National Labor Relations Board has looked for evidence of an actual intent to waive a bargaining right:

> In order for contract language to effect a waiver of bargaining rights, it must be 'clear and unmistakable.' In assessing that question, the Board considers the bargaining history of the contract language and the parties' interpretation of the language. Where an employer relies on contract language as a purported waiver to establish its right to change terms and conditions of employment not contained in the contract unilaterally, the Board requires evidence that the matter in issue was 'fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.' 1 Morris, Developing Labor Law (2d ed, 5th supp), ch 13, pp. 332-333.

The "clear and unmistakable" standard has been applied by the Michigan Employment Relations Commission, as well as this Court. See *Kent Co Ed Ass'n v Cedar Springs*, 157 Mich App 59, 66, 403 NW2d 494 (1987); *Lansing Fire Fighters v Lansing*, 133 Mich App 56, 66; 349 NW2d 253 (1984); *Royal Oak Police Officers Ass'n v Royal Oak*, 1988 MERC Lab Op 605, 611; *Westland Fire Fighters Ass'n v Westland*, 1987 MERC Lab Op 793, 801.

The arbitrator's finding that the "zipper clause" did not represent a clear and unmistakable waiver of the duty to bargain before altering the take-home vehicle practice applicable to detectives was not erroneous. Specifically, the CBA lacks a specific reference to take-home vehicles assigned to detectives. As such, the contract between the parties is not sufficiently specific to demonstrate that defendant clearly and unmistakably waived its right to bargain over changes in the take-home vehicle practice applicable to detectives.

Because there is no evidence that the arbitrator's award was obtained through fraud, duress, or other undue means and there are no errors that are apparent on the face of the award, we cannot second-guess the decision of the arbitrator.

We reverse the trial court's order and reinstate the award of the arbitrator.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood